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No. 08-441

In The
Supreme Court of the United States

JACK GROSS,

Petitioner,

v.

FBL FINANCIAL SERVICES, INC.,

Respondent,

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF AMERICAN ASSOCIATION FOR JUSTICE AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The American Association for Justice (AAJ) is a voluntary national bar association whose trial lawyer members primarily represent individual plaintiffs in civil actions. Among those plaintiffs are victims of employment discrimination who seek legal redress under Title VII, the Age Discrimination in Employment Act or other civil rights statutes.

In AAJ's view, these statutory remedies should be freely available, not only to compensate the victims of illegal discrimination, but also to ensure that society reaps the benefits of the work of qualified individuals. For that reason AAJ suggests that a single standard, grounded in the statute and free of arbitrary criteria, be applied in all cases.

SUMMARY OF ARGUMENT

In this case, the Court is asked to determine whether direct evidence is required for a motivating-factor jury instruction in a case arising under the ADEA, 29 U.S.C. §§ 621 *et seq.* In *Desert Palace v. Costa*, 539 U.S. 90 (2003), this Court ruled that direct evidence is not required for a motivating-factor jury instruction in cases arising under Title VII, 42 U.S.C. § 2000e-2(m). Because the reasoning of *Desert Palace* is equally as compelling in ADEA cases, AAJ believes

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[1] Pursuant to Rule 37.6, *Amicus Curiae* states that no counsel for a party authored any part of this brief, and no person or entity, other than the *Amicus Curiae*, its members, and its counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for both parties have consented to the filing of this brief.

that direct evidence should not be required for a motivating-factor jury instruction. Moreover, both Title VII and the ADEA prohibit discrimination "because of" a protected characteristic. In *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989), the Court construed the statutory language of Title VII "because of" to mean that Plaintiff's burden was to prove that a protected characteristic "played a motivating part in an employment decision . . . ." *Id*. at 244. Conventional rules of litigation mandate that the same standards of causation should not require a different method of proof.

The Court's decision in *Desert Palace* left many unanswered questions, which has created confusion in the lower courts. This Court should clarify now that all employment discrimination cases are potentially multiple-motive cases, requiring proof that an illegal reason was the motivating factor for an adverse employment action. The defendant can limit either liability or damages by proving that while age was a motivating factor, it was not a "determining factor" or "but-for" reason for an adverse employment action—the same-decision affirmative defense. In the alternative, to simplify jury instructions and reduce the risk of jury confusion, plaintiffs may choose to meet the higher "determining-factor /but-for" standard, rendering the same-decision affirmative defense moot.

Distinctions based on direct/circumstantial evidence, the number of motives, and the strength of Plaintiff's case are all arbitrary and are unrelated to the statutory text. The Court should reject these arbitrary distinctions and instead focus on whether under the language of the statute the defendant took adverse action "because of" an illegal reason.

ARGUMENT

I. DIRECT EVIDENCE IS NOT REQUIRED FOR A MOTIVATING FACTOR JURY INSTRUCTION.

Courts have generally recognized two frameworks for analyzing disparate treatment discrimination cases. Although the terminology adopted by the lower courts has led to confusion, the first framework has its origins in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). The *McDonnell Douglas* evidentiary framework is a *guideline* using shifting burdens at summary judgment to assist the court in determining the existence of an illegal motive. The application of *McDonnell Douglas* was never intended to be rigid, mechanized, or ritualistic. "Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978). The shifting burdens of *McDonnell Douglas* were never intended to impede Plaintiff's ability to reach trial. To the contrary, they were developed in recognition that discriminatory intent is often difficult to prove and to assist Plaintiff in surviving summary judgment. *McDonnell Douglas*, 411 U.S. at 802-03. No particular type of evidence is required to establish a violation of the ADEA. Nor is it significant how that evidence is designated—as part of the prima facie case or pretext. Nor is it significant whether that evidence is classified as "direct" or "circumstantial." The inflexible application of the *McDonnell Douglas* shifting burdens creates a barrier to the vindication of civil rights, and is inconsistent with federal legislative policy.

The degree to which the discriminatory motive may have influenced the adverse employment action is relevant only to the issue of causation, which is not addressed by the *McDonnell Douglas* framework at all.

Under the *McDonnell Douglas* or "pretext" framework, Plaintiff is simply required at trial to prove that an illegal reason was "a determining factor" in the decision to take adverse action.[2] Because Plaintiff assumes the burden of proving that the illegal reason was the "but-for" cause of the adverse employment action, there exists no affirmative defense.

The second framework was recognized in *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989) and was later codified in the Civil Rights of Act of 1991, 42 U.S.C. § 2000e-2(m). This model does not utilize shifting burdens at summary judgment, but instead focuses more directly on proving that a protected characteristic was a "motivating factor" in the decision

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[2] It is generally recognized that the shifting burdens established in *McDonnell Douglas* are not an appropriate jury instruction. *See United States Postal Serv. Bd. of Governors v. Aikens,* 460 U.S. 711, 715 (1983) ("All courts have recognized that the question facing triers of fact in discrimination cases is both sensitive and difficult. . . . But none of this means that [courts] should treat discrimination differently from other ultimate questions of fact. Nor should they make their inquiry even more difficult by applying legal rules which were devised to govern 'the allocation of burdens and order of presentation of proof' in deciding this ultimate question") (citation omitted); *Brown v. Packaging Corp. of America*, 338 F.3d 586, 595-99 (6th Cir. 2003) (citing cases from the Second, Fourth, Fifth, Seventh, Eight, Ninth, Tenth, and Eleventh Circuits); *Blair v. Henry Filters, Inc.*, 505 F.3d 517, 528 n.10 (6th Cir. 2007) (comparing pattern jury instructions).

to take adverse action. In *Price Waterhouse*, the Court ruled that the defendant could defeat liability by proving as an affirmative defense that it would have taken the same action without consideration of the protected characteristic. *Id*. at 246.

The evidentiary framework of *McDonnell Douglas* is not inconsistent with the motivating-factor standard articulated in *Price Waterhouse* and qualified by the Civil Rights Act of 1991. They are two separate concepts. The shifting burdens of *McDonnell Douglas* provide an evidentiary framework for the purpose of proving discriminatory intent; the existence of a discriminatory motive. The degree to which the discriminatory motive may have influenced the adverse employment action is relevant only to the issue of causation, which is not addressed by the *McDonnell Douglas* framework at all. *Price Waterhouse*, on the other hand, addresses the issue of causation and not intent.

The motivating-factor standard codified in the Civil Rights of Act of 1991 enabled Plaintiff to establish liability upon a showing that a protected characteristic was a motivating factor, but allowed the Defendant to escape damages and certain types of equitable relief only after satisfying its burden that it would have made the same decision even without consideration of the protected characteristic. 42 U.S.C. § 2000e-5(g)(2)(B). The statute did not, however, attempt to regulate the method of proof or the type of evidence to be utilized.

In *Desert Palace v. Costa,* 539 U.S. 90 (2003), the Court was asked to resolve the considerable confusion about whether direct evidence was required to obtain a motivating-factor jury instruction. In relevant part,

the Court ruled that nothing in the text of the statute required a heightened standard of direct evidence, *id*. at 98-99, and also relied upon the long standing rule of law that direct evidence is not more probative than circumstantial evidence. *Id.* at 100.[3]

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[3] Some federal judges and commentators have opined that *Desert Palace* has rendered the *McDonnell Douglas* model obsolete and it has no applicability to cases at the summary judgment stage or any other stage. *See Griffith v. City of Des Moines,* 387 F.3d 733, 745 (8th Cir. 2004) (Magnuson Concurring) ("For thirty years, courts have been slaves to the *McDonnell Douglas* burden shifting paradigm that is inconsistent with Title VII. *McDonnell Douglas* cannot be reconciled with the Civil Rights Act of 1991, as it is indignant to the clear text of the statute"); *Wells v. Colorado Dep't of Transp.*, 325 F.3d 1205, 1221 (10th Cir. 2003) (Hatrz, J. Dissenting) ("The *McDonnell Douglas* framework only creates confusion and distracts courts from 'the ultimate question of discrimination *vel non*.' *McDonnell Douglas* has served its purpose and should be abandoned") (citation omitted); *Costa v. Desert Palace, Inc.,* 299 F.3d 838, 867 (9th 2002) (en banc) (Gould dissenting) ("The Supreme Court's seminal opinion in *McDonnell Douglas* would be effectively overruled by an incorrect interpretation of *Hopkins* that jettisons the direct evidence requirement") *affirmed* 539 U.S. 90 (2003); William Corbett, *McDonnell Douglas*, *1973-2003: May You Rest In Peace,* 6 U. PA. J. LAB. & EMP. L. 199, 212 (2003-04) ("*McDonnell Douglas* is dead for Title VII claims because the Supreme Court eradicated the direct evidence limitation that made motivating factor/mixed motives applicable to only a discrete set of cases"). *But see Dunbar v. Pepsi Cola General Bottlers of Iowa, Inc.,* 285 F. Supp. 2d 1180, 1197 (N.D. Iowa 2003) (Bennett, J.) ("Thus, the *McDonnell Douglas* burden-shifting paradigm must only be *modified* in light of *Desert Palace* . . ., and *only in its final stage,* so that it is framed in terms of whether the plaintiff can meet his or her 'ultimate burden' to prove intentional discrimination, rather than in terms of

Both Title VII, 42 U.S.C. § 2000e-2(a)(1), and the ADEA, 29 U.S.C. § 623(a)(1), prohibit discrimination "because of" a protected characteristic. In *Price Waterhouse*, the Court construed the statutory language of Title VII "because of" to mean that "gender must be irrelevant to employment decisions." 490 U.S. at 240. The Court established that Plaintiff's burden was to prove that a protected characteristic "played a motivating part in an employment decision . . . ." *Id.* at 244. Conventional rules of litigation mandate that the same standards of causation should not require a different method of proof. (*See* Pet'r Br. 27-30.)

Furthermore, requiring courts to distinguish between direct and circumstantial evidence will inevitably lead to confusion and subjective judicial judgments concerning the nature of the evidence which qualifies as "direct." As stated by the Ninth Circuit, "[t]he resulting jurisprudence has been a quagmire that defies characterization despite the valiant efforts of various courts and commentators." *Costa v. Desert Palace, Inc.*, 299 F.3d 838, 851-53 (9th Cir. 2002) (discussing different standards by different circuits

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whether the plaintiff can prove 'pretext'") (emphasis in original); T.L. Nagy, *The False Dicotomy: The Effect of* Desert Palace v. Costa *on Summary Judgment in Title VII Discrimination Cases*, 46 S. TEX. L. REV. 137, 151-154 (2004) (collecting nineteen District Court cases, and recognizing Judge Bennett's modification to the third step of *McDonnell Douglas* as the trend); Christopher R. Hedican, James M. Hedican, & Mark P.A. Hudson, *McDonnell Douglas*: *Alive and Well,* 52 DRAKE L. REV. 383, 413-25 (2004) (arguing that courts and legal commentators who believe that *McDonnell Douglas* has been overruled are wrong, and that Judge Bennett's modified approach in *Dunbar* is consistent with *McDonnell Douglas*).

and inconsistent ruling by panels of the same circuit). *See also* Michael Zubrensky, *Despite the Smoke, There Is No Gun: Direct Evidence in Mixed-Motives Employment Law After* Price Waterhouse v. Hopkins, 46 STANFORD L. REV. 959, 970-80 (1994) (recognizing the differing approaches to direct evidence within the circuits).

II. THE COURT SHOULD ADOPT A SINGLE STANDARD TO BE APPLIED IN ALL DISCRIMINATION CASES

Although the Court in *Desert Palace* determined that direct evidence was not required for a motivating-factor jury instruction in a Title VII case, it did not establish an alternative criteria for making that judgment. This failure has resulted in substantial confusion in the lower courts concerning which model applies and the standard for making that judgment. *See* NELA Amicus Br. Supp. of Pet. 19-23; *Wright v. Murray Guard Inc.*, 455 F.3d 702, 716-19 (6th Cir. 2006) (discussing different approaches by the circuits) (Moore J. concurring).[4]

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[4] There is also considerable disagreement in the lower courts about whether the holding of *Desert Place* was intended to apply to summary judgment. *Compare White v. Baxter Healthcare Corp.*, 533 F.3d 381, 400 (6th Cir. 2008) ("holding that the *McDonnell Douglas/Burdine* burden-shifting framework does not apply to the summary judgment analysis of Title VII mixed-motive claims") (footnote omitted); *Griffith v. City of Des Moines*, 387 F.3d 733, 736 (8th Cir. 2004) ("[W]e conclude that *Desert Palace* had no impact on prior Eighth Circuit summary judgment decisions") (footnote omitted); *Cooper v. Southern Co.*, 390 F.3d 695, 725 n.17 (11th Cir. 2004) (rejecting an argument that "the *McDonnell Douglas* burden-shifting analysis . . .

This Court should reject the requirement of direct evidence for all non-Title VII cases as arbitrary. It should further reject efforts to replace this arbitrary rule with a different arbitrary rule, including the number of motives or a subjective determination about the strength of Plaintiff's case. Instead of trying to preserve an arbitrary and unworkable distinction between so-called "direct evidence"/ "*Price Waterhouse*"/ "mixed-motive" cases, on one hand, and "circumstantial evidence"/ "*McDonnell Douglas*"/ "pretext cases" on the other hand, courts should return to the text of the anti-discrimination statute at issue, and determine whether the plaintiff demonstrated that the defendant took adverse action "because of" an illegitimate reason(s). The Court should adopt a single standard for use in all discrimination cases based upon ordinary principles of statutory interpretation to determine the proper standard of causation for a particular statute. *See* Michael J. Zimmer, *The New Discrimination Law; Price Waterhouse is Dead, Whither McDonnell Douglas?*, 53 EMORY L.J. 1887, 1891 (2004) (arguing for "a uniform method of proof for individual discrimination Cases that focuses on the evidence and the inferences that can be drawn from

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was radically revised by the Supreme Court in *Desert Palace*" and noting that "after *Desert Palace* was decided, this Court has continued to apply the *McDonnell Douglas* analysis in non-mixed-motive cases") (citations omitted) *with Metoyer v. Chassman,* 504 F.3d 919, 931 (9th Cir. 2007) ("Instead, 'when responding to a summary judgment motion . . . [the plaintiff] may proceed by using the *McDonnell Douglas* framework, or alternatively, may simply produce direct or circumstantial evidence demonstrating that a discriminatory reason more likely than not motivated [the employer]'.") (citation omitted).

that evidence, all without regard to differentiated rules regarding proof structures").

A. The Court Should Reject the Number of Motives as a Criteria for Distinguishing Causation. All Cases Are *Potentially* Multiple Motive Cases.

The phrase "mixed-motives" has become a term of art which has nothing to do with number of the employer's motives and has led to considerable confusion. The number of an employer's motives is irrelevant to the proper standard of causation.

If a case is deemed a "mixed-motive" case, it proceeds at the summary judgment stage and at trial to focus directly on proving that a protected characteristic was a "motivating factor" in the decision to take adverse action subject to the same-decision affirmative defense. This approach assumes that the employer had multiple motives. If, on the other hand, the case is deemed a "pretext" case, it relies upon the *McDonnell Douglas* shifting burdens at summary judgment, and at trial requires proof that an illegal reason was "a determining factor" or "but-for" cause for the adverse action. This approach falsely assumes a single employer motive. The distinction recognized between single-motive and multiple-motive cases is illusory. Neither model forecloses the existence multiple motives.

In virtually every employment discrimination case, the employer offers a legitimate non-discriminatory reason for its adverse action. In every case the jury may decide 1) that the legitimate reason motivated the employer, and that the illegal reason did

not; 2) that the illegal reason motivated the employer and the legitimate reason did not; *or* 3) that both the illegal and legitimate reason motivated the employer. In this sense, every case is *potentially* a multiple or mixed-motive case. The "motivating-factor" or "but-for" standard of causation has nothing whatever to do with the number of motives. Under no recognized standard must an employee prove that an illegal reason was the only reason for an adverse action.[5] Likewise, the probative value of direct evidence or a subjective judgment about the strength of Plaintiff's

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[5] When Congress enacted Title VII it "specifically rejected an amendment that would have placed the word 'solely' in front of the words 'because of.'" *See Price Waterhouse,* 490 U.S. at 241 n.7 (Brennan, J., plurality opinion) *citing* 110 Cong. Rec. 2728, 13837 (1964). Accordingly, in numerous cases under the ADEA courts have routinely instructed juries that in order to prevail "age need not be the sole factor in the decision to terminate the plaintiff's employment, but must be 'a determining factor' or 'make a difference.'" *E.g.*, *Graham v. Dresser Indus. Inc.,* 928 F.2d 408, 408 (9th Cir. 1991) ("To constitute an ADEA violation, age need not be the sole factor in the decision to terminate the plaintiff's employment, but must be 'a determining factor' or 'make a difference'") (citing Ninth Circuit cases); *Golomb v. Prudential Ins. Co.,* 688 F.2d 547, 550 (7th Cir. 1982) ("We agree that a successful claimant in an ADEA action need not prove that age was the sole determining factor for the defendant-employer's action, but rather that age was a determining factor"); *Faulkner v. Super Valu Stores Inc.,* 3 F.3d 1419, 1426 n.3 (10th Cir. 1993) (Recognizing a proper instruction under *McDonnell Douglas*: "[A] plaintiff need not prove that age was the sole or exclusive motivation for defendant's failure to hire him. Age is a determining factor if a plaintiff would have been hired except for his age").

case is completely unaffected by the number of motives.

Some courts continue erroneously to distinguish the standard for causation based upon the number of motives. *E.g. Ginger v. District of Columbia,* 527 F.3d 1340, 1346 (D.C. Cir. 2008) (distinguishing between single-motive and mixed-motive type cases); *Dukes v. Wal-Mart, Inc.,* 474 F.3d 1214 (9th Cir. 2007) (distinguishing between "single-motive" cases requiring "but-for" causation, and "mixed-motive" cases requiring "motivating-factor" causation, subject to same decision affirmative defense); *Wright v. Murray Guard, Inc.,* 455 F.3d 702, 706 (6th Cir. 2006)("Title VII single-motive claims proceeding on circumstantial evidence are analyzed under the burden-shifting framework set forth in *McDonnell Douglas*").

The plain language of the Civil Rights Act of 1991 makes no distinction between cases involving a single motive or multiple motives. The language of the statute does not allow for the application of the motivation factor standard *only* when other factors also motivated the practice. It applies *even though* or *regardless* of whether other factors motivate the practice. 42 U.S.C. § 2000e-2(m). The same standard should apply to cases filed under the ADEA.

B. Plaintiff Should Be Given a Choice of Which Model to Use.

Shifting burdens, whether a burden of production or persuasion, is often seen as confusing to juries. To avoid that confusion, a Plaintiff may choose to assume at trial the more difficult "a determining factor" standard of causation. By assuming the burden of proving "but-for" causation the same decision

affirmative defense becomes unnecessary. This Plaintiff's choice does not compromise the single and uniform "motivating factor" standard. It is non-prejudicial to the Defendant and has the salutary effect of avoiding jury confusion. (*See* Pet'r Br. 15 n.23.)

In *Dukes v. Wal-Mart, Inc.,* 474 F.3d 1214 (9th Cir. 2007), the Court erroneously used the "single-motive"/"mixed-motive" terminology to distinguish between cases that require proof that an adverse action was taken "because of" gender and cases where gender was a "motivating factor." Notwithstanding that confusion, the Court acknowledged that Plaintiff had a choice of which theory to utilize. *Id*. at 1240. In order to preserve the class action format, Plaintiff chose the "a determining-factor" standard; "[t]his means that Wal-Mart is not entitled to present a 'same decision defense' because such a defense at the remedy stage applies only where the conduct was the result of 'mixed motives.'" *Id*. at 1241 (citation and footnote omitted). *See also Dominguez-Curry v. Nevada Transp. Dep't,* 424 F.3d 1027, 1037 (9th Cir. 2005) ("a plaintiff may produce direct or circumstantial evidence demonstrating that a discriminatory reason more likely than not motivated the defendant's decision, *or* alternatively may establish a prima facie case under the burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green*") (citation omitted); *Diamond v. Colonial Life & Accident Ins. Co.*, 416 F.3d 310, 318 (4th Cir. 2005) ("A plaintiff can survive a motion for summary judgment by presenting direct or circumstantial evidence that raises a genuine issue of material fact as to whether an impermissible factor such as race motivated the employer's adverse employment decision. . . . Alternatively, a plaintiff may 'proceed under [the *McDonnell Douglas*] 'pretext' framework") *quoting Hill v. Lockheed Martin Logistics*

Mgmt., Inc., 354 F.3d 277, 284-85 (4th Cir. 2004) (en banc).

In every case, Plaintiff should be allowed to prove that an illegal reason was a motivating factor, with the burden on the Defendant to prove that it would have made the same decision even without consideration of the protected characteristic. Plaintiff should be allowed the choice to prove "but-for" causation.

CONCLUSION

Direct evidence is not required for a motivating-factor jury instruction. The Court should reject this and other arbitrary criteria and adopt a single standard to be applied in all cases.

Respectfully submitted this 2nd day of February 2009.

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